



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL CASE NO. 12 OF 2016

REPUBLICPROSECUTOR

VERSUS

J M M.....ACCUSED

JUDGMENT

1. **J M M**, the accused herein is charged with the **offence of murder** of her child namely **P M W** (deceased) on 15th April 2016.
2. The mother of the accused **M M (PW 1)** stated in evidence that the accused had three children, including the deceased. The other two children were living with their respective biological fathers. One was taken by his father to Meru while the other by his father in Nanyuki. The deceased child however was with the accused.
3. Prior to the death of the deceased child he was living and being looked after by accused's mother PW 1, his grandmother. PW 1 said that the deceased had wounds and was suffering from H.I.V. She was therefore taking care of him while the accused lived elsewhere.
4. PW 1 said that on her husband becoming sickly she requested the accused to take away the deceased to her home because she, PW 1, needed to look after her sickly husband. The accused as requested took the deceased away from PW 1's home.
5. On 15th April 2016 the accused went to visit her mother, PW 1, but without the deceased child. On PW 1 making inquiry of the whereabouts of the deceased accused informed her that she had taken the child to a place where children suffering with H.I.V are taken care of. The accused remained at PW 1's home from 15th April 2016 until 17th April 2016. PW 1 learnt that accused was arrested on that day she left her home on suspicion of killing her child, the deceased.
6. The body of the deceased was discovered by **PETER KARIUKI MIGWE (PW 2)** on 17th April 2016. PW 2 worked at his farm in Nyeri. As he was leaving the forest he noticed a bag which is ordinarily used to package flour. It was a clear polythene bag. When he looked at it he noticed a child's arm. It was then, at about 7 p.m., that he telephoned forest manager to inform him of his discovery.
7. Because it was late when the discovery of the deceased body was made by PW 2, the forest officer did not go to the scene until the following day. Those officers Cpl Ephrahim Kinyua Karimi, Oliver Ntwiga Kinyua, Sgt Elijah Njama Ndirangu and Samuel Kilika Kamau went to the scene. Once these officer's confirmed that the content of the bag was a dead baby's body they telephone Narumoru Police Station where from officers went to the scene and recovered the body of the deceased.
8. The post-mortem was conducted by Dr. Gitaka. He found the cause of death was asphyxia secondary to manual strangulation. The doctor found that the body of the deceased had been folded and placed into two plastic bags, one of Nakumatt supermarket and another that was transparent polythene bag.
- 9 The accused in her defence admitted that the deceased was her 2 years 3 months old baby.
10. Accused stated that on 11th April 2016 she took three of her children including the deceased, to her father to look after them at Ngerima in Nyeri. She said that at that time her father and mother PW 1 were separated, that her mother had left their home. She therefore said that the evidence of her mother before court was a lie. She said the reason she left her three children, including the deceased, under the care of her father was because she had secured a casual job elsewhere. That on 18th April 2016 as she left her place of work she met Peter Weru Karaba PW 8, who after hiring a motorcycle, took her to the police post. Accused said that she was informed that the child had been killed and left in the forest and she did not know todate how that child died. She denied being involved in the death of her child.
11. On being cross examined the accused denied killing her child and denied that when she was arrested she intended to buy poison to commit suicide. She termed as lies the prosecution's evidence tending to show that she killed her child.

ANALYSIS AND FINDINGS

12. The prosecution proved the death of the deceased through the evidence of PW 2, PW 3 and PW 5 to PW 9 all of whom saw the body of the deceased at the forest. Death was also proved by Dr. Kitaka who performed the post-mortem. The outcome of the post-mortem revealed that deceased death was due to strangulation. From that conclusion of the post-mortem it is clear that death of deceased was as a result of an unlawful act.

13. What I need to consider is who committed the unlawful act.

14. The prosecution's case commenced with the evidence of the accused's mother PW 1. She narrated that she had looked after the deceased child because he suffered from poor health due to his H.I.V. status. The evidence of the village elder PW 8 was that PW 1 looked after deceased because the accused used to take too much alcohol and would then neglect the deceased.

15. I got a clear impression that PW 1 had a lot of love for the deceased. She even, during her evidence, muttered that accused if she did not wish to take care of deceased should have returned him to her. She even shed tears while narrating her evidence. She stated that the only reason she asked the accused to take over the care of the deceased was because she, PW 1, needed to take care of her ailing husband who eventually succumbed to death.

16. Although the accused alleged to have left her three children in the care of her father I did not believe her defence. That defence was contradicted by the evidence of her mother PW 1 and the evidence of the village elder PW 8. Both these witnesses, senior members of the society, were truthful in my view. As I said they are senior members of the society. PW 1 in my view was, at the time she testified, approximately in her late 60's while PW 8 stated he was 80 years old. There is no reason why those two would lie. The mother of accused stated that the accused had three children two of them had been taken away from her by their respective fathers. The youngest one was left under the accused's care but she failed to take of him because of her alcohol abuse. That child was looked after by PW 1 until April 2016. The accused was requested to take care of the child while PW 1 concentrated on taking care of her ailing husband. It was then that the child went missing and the accused on being asked by PW 1 where the child was she said that she had placed him in a home where child with H.I.V were cared for. When PW 8 asked her where her child was accused said that the child was with her friend, a friend who did not own a telephone.

17. The accused in my view lied, right through her defence. She fabricated a story that she had, under her care, three children when the evidence of her mother, PW 1 and that of the village elder PW 8, was that she was looking after the three of her children. The accused even lied that her mother and father were separated. If this indeed was true she would have instructed her learned counsel to cross examine her mother of the same. Her mother's evidence, which place the accused as the last person to be with the deceased child, while he was alive was not challenged in cross examination at all.

18. I note that the prosecution relied on circumstantial evidence. Such evidence is sometimes said to be the best. This is what was stated in the case *Republic v Dorothy Awuor Juma* [2018] eKLR where the court stated:-

“Republic –vs- Taylor Weaver and Donova (1928)21 Cr. App. R. 20

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence, to say, it is circumstantial.”

19. In this case the evidence of the prosecution is that the accused took away the child from PW 1 and that child was not again seen alive. The child was to later be found dead in plastic bags in the forest. The accused was required, in view of that clear and cogent evidence, to give reasonable explanation, as set out in section 111 of the Evidence Act Cap 80 explaining what happened to the child who was healthy when she took him from PW 1 which lead to him being found dead and wrapped with plastic bags.

20. Since I find the evidence of PW 1 to be consistent, reliable and truthful and because I found the accused lied right through her defence I find that it was the unlawful act of the accused which cause the death of the deceased.

21. The prosecution however failed to prove malice aforethought, the *mens rea*. It became clear even as accused was cross examined by the prosecution that the accused when she killed the deceased she was a tormented person. It became clear that her intention was to kill the deceased then take poison and commit suicide. It follows therefore that I find that accused did not have malice aforethought.

22. It is for that reason that I substitute the charge against J M M from murder contrary to section 203 of the Penal Code to that of **Manslaughter contrary to section 202 of the Penal Code.**

J M M is accordingly convicted of Manslaughter.

DATED AND DELIVERED AT NANYUKI THIS 2ND DAY OF NOVEMBER 2018.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Mariastella

Accused:

For Accused

For the State:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE